UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 35802 and MERCHANT MARINER'S DOCUMENT
Issued to: Jerry Dewain Hankins Z-346-32-2990-PI

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2268

Jerry Dewain Hankins

This appeal has been taken in accordance with Title 46 U. S. C. 239(g) and 46 CFR 5.30-1.

By order dated 2 September 1980, an Administrative Law judge of the United States Coast Guard at Houston, Texas, suspended Appellant's license for two months, and further suspended his documents for three months on twelve months' probation, upon finding him guilty of negligence. The specifications found proved alleged that while serving as Operator onboard the tug DOMAR CAPTAIN under authority of the license above captioned, on or about 21 June 1980, Appellant failed to insure that the barge DOMAR 118 was properly secured for sea, and on or about 21-27 June 1980, failed to adequately check the DOMAR 118 while he had it on a 1500 to 1800 foot tow. The specifications allege that both failures contributed to the sinking of the DOMAR 118 and subsequent oil pollution into the navigable waters of the United States on 27 June 1980.

The hearing was held at Tampa, Florida, on 4 August 1980.

At the hearing, Appellant was represented by professional counsel and entered a plea of guilty to the charge and each specification.

DOMAR 118 was taken in tow by the tug DOMAR CAPTAIN at a distance of 1500 to 1800 feet, bound for Tampa Bay, Florida. The vessel was taking a "following sea" a portion of the time. Appellant did not round up and inspect the barge from 21 June to 27 June.

Upon approaching Tampa Bay, Florida, on 27 June, Appellant was told by passing traffic that DOMAR 118 was sinking by the stern and was trailing oil in the water. Appellant reported to the Coast Guard that the barge was sinking near Buoy 6 of Egmont Channel. Appellant was advised to clear the channel and ground the barge in the area to the southeast of Buoy 6, outside the channel. There was an oil spill and subsequent clean up.

BASSES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that, although Appellant does not deny the charge, the order of suspension and probation should be overturned and an admonition be assessed for the following reasons: (1) The barge was of an unusual design and no specific instructions concerning unusual securing procedures were given to Appellant by the owner; (2) Appellant relied on licensed mates to secure the barge; (3) Appellant alleges that rounding up and checking is not a customary practice in the offshore towing industry, and that the barge owner did not require it; (4) Domar Ocean Transportation of Morgan City, Louisiana, believes that it did not provide the Appellant with sufficient information to properly secure the barge; and (5) the Investigating Officer recommended an admonition.

OPINION

The plea of guilty was taken after full advice by professional counsel as to possible consequences. A provident plea of guilty eliminates any fact controversy and is sufficient predicate for a finding that the facts alleged are true. Appeal Decisions No. 1707 and 2107. It further constitutes a waiver of all non-jurisdictional defects and defenses, Lipscomb v. United States,226 F.2d 812 (8th Cir. 1955) and obviates the requirement for establishing a prima facie case. Appeal Decision No. 1712.

The charge against Appellant while operating under authority of his license. Under 46 CFR 5.01-35(a), "A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document held by him either when the holding of such license, certificate or document is required by law or regulation or is required in fact as a condition of employment. A person does not cease to act under the authority of his license, certificate of document while ashore on authorized or unauthorized shore leave from the vessel."

Under 46 U. S. C. 405(b) the vessel was required to be under the direction and control of a person holding a license as operator of uninspected towing vessels only while underway. Under specification one, where the vessel was moored to a dock, jurisdiction, if it exists,is based on the holding of a license as a condition of employment. In this case Appeal Decision 2104 (BENSON) would appear to require dismissal of the specification absent a showing on the record that the license was a condition of employment even though the respondent had pleaded guilty. In Benson, after a plea of guilty, matters on the record, including a concession by the Investigating Officer, showed that Appellant was not required by law, regulation, or condition of employment to hold

a license, nor did the charge allege jurisdiction. Therefore he was not acting under the authority of his license and, in fact, was not charged as doing so in a case brought under 46 U. S. C. 239. In other words the plea was shown by the record to be improvident. Given that situation the ruling in Benson which requires evidence in the record establishing the holding of a license as a condition of employment where a plea of guilty is entered and neither law nor regulation require the license, was overly broad and will not be followed. While the respondent may not by a guilty plea stipulate with the Investigating Officer as to matters of law governing jurisdiction, the respondent may by guilty plea admit the factual predicate to jurisdiction, presuming of course that the charge under consideration contains the requisite jurisdictional elements. Here, in effect, respondent admitted that the holding of the license was a condition of his employment thereby supporting the "under authority of the license" element of jurisdiction.

The Appellant also urges that the order of the Administrative Law Judge is overly severe for the reasons recited in the Bases of Appeal including that it is in excess of that recommended by the Investigating Officer. The severity of the order of the Administrative Law Judge is a matter for his discretion and will be modified on appeal only if shown to be arbitrary and capricious. Where, as here, the Appellant's only livelihood for support of a family is captain of a tug, an order not more severe than shown in the Table of Average Orders (46 CFR 5.20-165) is far from being arbitrary and capricious and will not be modified on appeal. Appeal Decision 1671 and Appeal Decision 2002.

CONCLUSION

The charge and two specifications of negligence against Appellant were proved by plea. The order of the Administrative Law Judge was not inappropriate.

ORDER

The Order of the Administrative Law Judge dated 2 September 1980 at Houston, Texas is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 3rd day of December 1981.